

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 39E 30150492) BY DENBURY GREEN PIPELINE –) MONTANA, LLC)	PRELIMINARY DETERMINATION TO GRANT TEMPORARY PERMIT
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On December 20, 2020, Denbury Green Pipeline-Montana, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 39E 30150492 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 250 GPM flow rate and 6.14 AF of volume for industrial uses (dust abatement). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of May 12, 2021. Christine Schweigert, Jill Lippard and Mark Elison of the Department met with Rusty Shaw and Bill Atchinson of Denbury and Chad Barnes of SWCA (Consultant), on November 13, 2020. An Environmental Assessment by the Bureau of Land Management for this Project was adopted on April 14, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Maps: Two undated NAIP aerial images overlain with roads, water sources and landownership showing proposed points of diversion and places of use
- Request for variance from measuring requirements included within the application.
- Two photographs of the proposed point of diversion dated July and August 2018.

Information Received after Application Filed

- Response to request for variance from measurement requirements dated January 19, 2021.
- Email from SWCA consultants to Christine Schweigert dated May 10, 2021 requesting an interim permit with receipt for the filing fee attached.
- Email chain between DNRC Hydrologist Christine Schweigert and SWCA Consultant Chad Barnes dated May 11, 2021 discussing the proposed place of use.

Information within the Department's Possession/Knowledge

- Letter from Montana Sage Grouse Habitat Conservation Program to Rusty Shaw of Denbury Inc. dated September 26, 2018.
- Environmental Assessment by the Bureau of Land Management Miles City Office titled DOI-BLM-MT-C020-2017-0081-EA Denbury Green Pipeline-Montana, LLC; Denbury Onshore, LLC, dated August 2018
- DNRC water right records
- Water right file no. 39E 30119872 for previous temporary permit on same source.
- DNRC Technical Report dated May 12, 2021
- USGS stream gaging information for gage no. 06334630 Box Elder Creek at Webster, MT.
- USGS Thornthwaite Water Balance Model
- USGS StreamStats Montana
- Weather station information from Ridgeway 1 S, Montana station.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from Corral Creek, by means of a pump, from June 15 through July 31 and October 1 through October 31 at 250 GPM up to 6.14 AF, from a point of diversion located in the NWSESW Sec. 7, T4S, R58E Carter County, for industrial use (dust abatement) from June 15 through July 31 and October 1 through October 31. The place of use for dust abatement over approximately 32 miles of roads includes portions of 32 Sections in T3S, R57 AND 58E; T4S, R57 AND 58E; and T5S, R57 and 58E in Carter County. Table 1, below, is a list of the places of use for dust abatement:

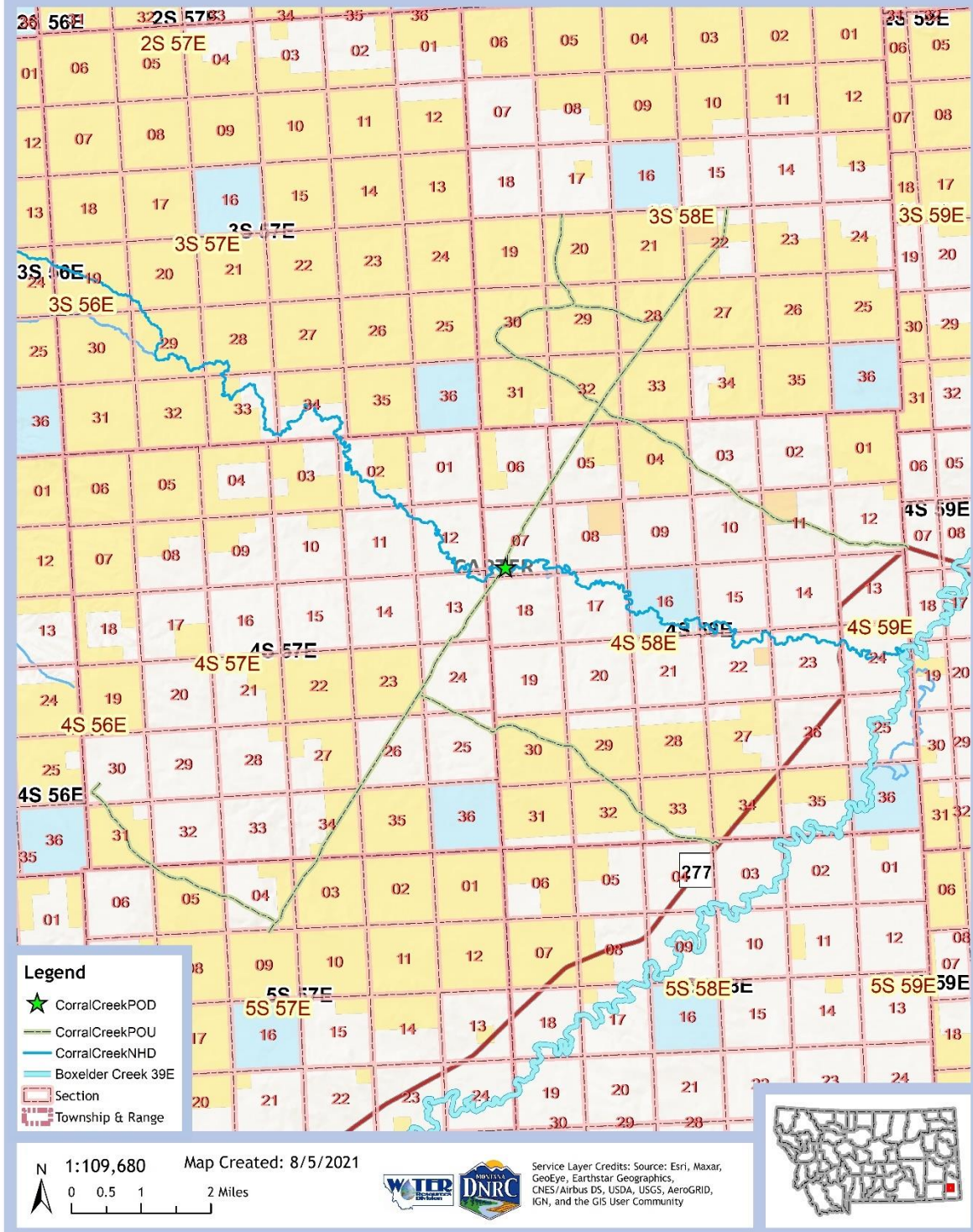
Table 1. Places of use for dust abatement

Township, Range, Section	Quarter Section/Government Lot
T3S R58E 20	W2
T3S R58E 22	W2NE, S2
T3S R58E 27	NWNW
T3S R58E 28	ALL
T3S R58E 29	N2
T3S R58E 30	E2, E2SW
T3S R58E 31	N2NE
T3S R58E 32	ALL
T3S R58E 33	W2
T4S R57E 13	E2, SESW
T4S R57E 23	SE
T4S R57E 24	W2
T4S R57E 25	N2
T4S R57E 26	W2NE, W2
T4S R57E 30	SW
T4S R57E 31	ALL
T4S R57E 34	E2, E2SW
T4S R57E 35	NWNWNW
T4S R58E 18	LOT 1
T4S R58E 29	W2, SWSE
T4S R58E 3	W2, SWSE
T4S R58E 30	N2
T4S R58E 32	E2
T4S R58E 33	S2
T4S R58E 4	N2

T4S R58E 5	N2, NWSW
T4S R58E 6	SE
T4S R58E 7	W2, NE
T5S R57E 3	NW
T5S R57E 4	ALL
T5S R57E 5	N2
T5S R58E 3	LOT 4

2. The proposed use is temporary ending on October 31, 2024.
3. The place of use is generally located approximately 4.7 miles west of Ridgeway, MT.

NA 39E 30150492 - Denbury Green Pipeline - Montana, LLC



Preliminary Determination to Grant
 Application for Beneficial Water Use Permit No. 39E 30150492.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

4. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

6. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

7. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnes (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

8. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability
FINDINGS OF FACT

10. Corral Creek is a non-perennial stream according to USGS and is documented as having no flow in July and August 2018 in photographs provided by the Applicant in the application materials. While the photos document that there was zero flow in the months the photos were taken, it does not mean that there is never flow during those months and that is why some flow is shown in the modeling exercise below. The Applicant requested and received a variance from the water measurement requirements in ARM 36.12.1702. DNRC used the USGS Thornthwaite Water Balance model, StreamStats of Montana online application, and the USGS gaging station records for USGS Box Elder Creek at Webster, MT to estimate monthly and annual flow rate and volume for the proposed point of diversion.

11. Mean monthly temperature and precipitation were obtained from the Ridgeway 1 S Montana weather station. The latitude was set to 45 degrees, 29 minutes north, and the elevation was 999.1 meters above mean sea level. The Thornthwaite model takes the input parameters and returns total annual runoff which is then multiplied by the basin area in acres to determine annual runoff in AF/YR. The drainage basin above the Corral Creek POD is approximately 35.02 Sq. miles based on mapping in the USGS StreamStats Montana program. Annual runoff above the proposed POD is estimated at 3,110.44 AF. The total volume was divided by 1.98 and by 365 to estimate the mean annual flow rate at 4.3 CFS.

12. The Department. took the mean monthly flow at the Boxelder Creek gage and divided it by the mean annual flow to determine the percent of mean for each month. DNRC then multiplied the predicted mean annual flow on Corral Creek by the monthly percent of mean annual flow for Boxelder Creek to estimate the monthly flow rate on Corral Creek. The flow rate was multiplied by the number of days each month and by 1.98 to calculate the monthly volume at the proposed point of diversion.

Table 2. Predicted monthly flow rate and volume at proposed POD on Corral Creek

Month	Mean Monthly Flow at Boxelder Creek Gage (CFS)	Percent of Mean Annual at Boxelder Creek gage (monthly mean divided by mean annual (90.55 CFS))	Predicted flow on Corral Creek (CFS) (4.3 CFS*mo. %)	Predicted flow on Corral Creek (GPM) (CFS*448.8)	Predicted Volume on Corral Creek (AF) (CFS*1.98*no. days)	No. Days/Mo.
January	4.2	4.64%	0.20	89.54	12.25	31
February	63	69.57%	2.99	1,342.59	165.85	28
March	249	274.98%	11.82	5,306.67	725.77	31
April	215	237.43%	10.21	4,582.02	606.44	30
May	222	245.16%	10.54	4,731.20	647.06	31
June	199	219.76%	9.45	4,241.02	561.31	30
July	44	48.59%	2.09	937.71	128.25	31
August	15	16.57%	0.71	319.77	43.73	31
September	20	22.09%	0.95	426.30	56.42	30
October	42	46.38%	1.99	895.06	122.41	31
November	9.9	10.93%	0.47	210.93	27.92	30
December	5.3	5.85%%	0.25	112.2	15.35	31

13. The Thornthwaite model is an accepted method for determining annual runoff from non-perennial streams in eastern MT. The distribution of flow based on percent of mean at a similar gaged source is an accepted method for estimating monthly distribution of flow. Corral Creek is within the Boxelder Creek drainage basin and has similar basin characteristics. The Boxelder Creek gage is the only gage in the basin.

CONCLUSIONS OF LAW

14. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

15. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water;

permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

16. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

17. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10-13)

Legal Availability:

FINDINGS OF FACT

18. The area of potential impact for this application is approximately 7.1 miles downstream to the mouth of Corral Creek at Boxelder Creek. This area includes the entire length of Corral Creek below the POD and there are 4 tributaries that contribute flow to the stream within that distance.

19. There are six legal demands within the area of potential impact. Three of the legal demands are for irrigation with no flow rate and a year-round period of diversion and use. These systems are most likely water spreading systems which use dikes or dams to divert the entire flow of the stream whenever it is available. The total annual volume was divided by the number of months in the period of diversion to calculate the monthly volume. Water right no. 39E 174663-00 has a period of diversion from September through April, therefore the legal demands for June and July are less than October.

Table 3. Legal Demands on Corral Creek within the area of potential impact

Water Right Number	Owner(s)	Flow Rate (CFS)	Volume per Month (AF)
39E 213042-00	Stieg, Tom and Kathy	0.07	0.05
39E 30106570	MT Board of Land Commissioners	0.0*	0.21
39E 124278-00	Stieg, Tom and Kathy		24.17

39E 174678-00	Higgins, Doran and Sharon		16.28
39E 176671-00	Yates Family Revocable Trust		13.13
39E 174663-00	Higgins, Doran and Sharon	0.0*	0.34
		0.07	54.18

*Water rights for livestock direct from source have no flow rate so the first right is given a flow rate of 35 GPM (0.07 CFS), all others are taken as zero.

20. Below is a comparison of the physical water supply at the point of diversion to the existing legal demands in the area of potential impact over the proposed period of diversion by flow rate and volume.

Table 4. Comparison of physical and legal demands by flow rate (CFS)

	June	July	October
Predicted Flow	9.45	2.09	1.99
Legal Demands	.07	.07	.07
Predicted Minus Legal Demands	9.38	2.02	1.92

Table 5. Comparison of physical and legal demands by volume (AF)

	June	July	October
Predicted Volume	561.31	128.25	122.41
Legal Demands	53.84	53.84	54.18
Predicted Minus Legal Demands	507.47	74.41	68.23

21. The amount of water physically available exceeds the legal demands each month throughout the proposed period of diversion. The smallest amount of flow available is 1.92 CFS and the smallest amount of volume available is 68.23 AF in October.

CONCLUSIONS OF LAW

22. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

23. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

24. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 18-21)

Adverse Effect

FINDINGS OF FACT

25. The Applicants are using pumps which can be shut down any time call is made. The Applicant proposes to monitor all water withdrawals and uses during the project activities to

ensure compliance with permits, additionally, the Applicant has land access agreements in place with landowners in the project area that allow the landowners to stop Denbury from withdrawing water if low water levels start impacting existing uses.

26. The Applicant proposes to find alternate sources of water such as temporary changes or purchase of municipal water if water supply is insufficient to meet existing legal demands.

27. The amount of water physically and legally available at the proposed point of diversion exceeds the amount requested in this application.

CONCLUSIONS OF LAW

28. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

29. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

30. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

31. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See

Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

32. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

33. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 25-27)

Adequate Diversion

FINDINGS OF FACT

34. Water for dust abatement will be diverted from Corral Creek by contracted water tank trucks. Typically, a 15 HP centrifugal pump is used with a flow range up to 250 GPM. All water diversions will be measured, and contractors will be required to maintain water gauges on each pump. Water logs will be maintained to document specific water quantities withdrawn at the POD.

CONCLUSIONS OF LAW

35. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

36. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

37. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

38. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 34).

Beneficial Use

FINDINGS OF FACT

39. The Applicant proposes to use the water for industrial use (dust abatement) which is a beneficial use under the Montana Water Use Act.

40. The requested flow rate for dust abatement is 250 GPM which is within the typical range for the water tank trucks that will be used for this purpose.

41. The requested volume of 6.14 AF for dust abatement was calculated by the Applicant and is based on 200,000 gallons per day for up to 10 days ($200,000 \times 10/325,851 = 6.14$). The water will be spread approximately 5 miles north and 5 miles south of the point of diversion.

CONCLUSIONS OF LAW

42. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

43. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

44. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

45. Applicant proposes to use water for industrial (dust abatement) which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence industrial is a beneficial use and that 250 GPM flow rate and 6.14 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 39-41)

Possessory Interest

FINDINGS OF FACT

46. The Applicant signed the affidavit on the application form affirming the Applicant has the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. This appropriation is specifically for dust abatement along the pipeline right-of-way and access roads. No water can be used in the absence of right-of-way agreements which constitute written consent.

CONCLUSIONS OF LAW

47. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

48. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

49. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 46)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Temporary Beneficial Water Use Permit No. 39E 30150492 should be GRANTED and will expire on October 31, 2024.

The Department determines the Applicant may divert water from Corral Creek, by means of a pump, from June 15 through July 31 and October 1 through October 31 at 250 GPM up to 6.14 AF, from a point in the NWSESW Sec. 7, T4S, R58E Carter County, for industrial use (dust abatement) from June 1 through July 31 and October 1 through October 31. The place of use is:

Township, Range, Section	Quarter Section/Government Lot
T3S R58E 20	W2
T3S R58E 22	W2NE, S2
T3S R58E 27	NWNW
T3S R58E 28	ALL
T3S R58E 29	N2
T3S R58E 30	E2, E2SW

T3S R58E 31	N2NE
T3S R58E 32	ALL
T3S R58E 33	W2
T4S R57E 13	E2, SESW
T4S R57E 23	SE
T4S R57E 24	W2
T4S R57E 25	N2
T4S R57E 26	W2NE, W2
T4S R57E 30	SW
T4S R57E 31	ALL
T4S R57E 34	E2, E2SW
T4S R57E 35	NWNWNW
T4S R58E 18	LOT 1
T4S R58E 29	W2, SWSE
T4S R58E 3	W2, SWSE
T4S R58E 30	N2
T4S R58E 32	E2
T4S R58E 33	S2
T4S R58E 4	N2
T4S R58E 5	N2, NWSW
T4S R58E 6	SE
T4S R58E 7	W2, NE
T5S R57E 3	NW
T5S R57E 4	ALL
T5S R57E 5	N2
T5S R58E 3	LOT 4

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this _____ day of _____ 2021.

/Original signed by Mark Elison/

Mark Elison, Manager

Billings Regional Office

Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this ____ day of _____ 2021, by first class United States mail.

DENBURY GREEN PIPELINE-MONTANA

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CHRISTINE SCHWEIGERT

DATE